IN THE UPPER TRIBUNAL **Case No.** CE/1188/2016
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

Decision: The decision of the First-tier Tribunal dated 23 December 2015 is set aside and the case is remitted to a different judge of the First-tier Tribunal to be re-decided.

REASONS FOR DECISION

1. This is an appeal, brought by the claimant with my permission, against a decision of the First-tier Tribunal dated 23 December 2015, dismissing her appeal against a decision of the Secretary of State dated 2 July 2015 to the effect that she was not entitled to employment and support allowance on her claim received on 9 June 2015 because she did not have a right of residence in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.

2. Some of the facts of the case are not altogether clear, but the principal facts currently seem to me to be as follows. The claimant was a Romanian national. She first came to the United Kingdom on 15 September 2008, when she was aged 23, with a view to taking up a place on a work-based vocational course studying for an NVQ level 2 in, it seems, health and social care or a related subject. She obtained a yellow registration certificate from the Home Office, under which she was allowed to work full time while studying (because her course was vocational). She worked in a care home from September 2008 until December 2009 and then obtained employment in a hospital and also with an agency. On 29 October 2010, having lawfully worked in the United Kingdom for over 12 months, she obtained a blue registration certificate under which she had free access to the labour market. She was a university student from September 2011 until June 2012 at a local university. She remained on the books as an employee of the agency until April 2012 and of the hospital until 31 August 2014. It is not clear to what extent she worked while studying. It is possible that she did some work during both terms and vacations throughout the year, but it is also possible that she worked only after the end of the summer term.

3. Then, in September 2012, she embarked on a three-year degree course at another university, studying for a BSc in biomedical studies. (It is possible that she only needed to do two years in view of the year she had already done but I do not know what she had been studying in the previous year and that may not be so.) This involved her moving to a different area. Again, it is not clear to what extent, if at all, the claimant worked during her first year. In any event, it appears that she failed her examinations in the summer of 2013 and therefore, although she was registered as a student at the university during the following year, she was not attending lectures and was merely required to resit her examinations in the summer of 2014. She obtained a job working for a care provider from August 2013 until November 2013. She was then in receipt of contribution-based jobseeker's allowance from 25 November 2013 to 9 January 2014 and employment and support allowance from 10 January 2014 to 23 May 2014, the latter recorded by the Secretary of State as

having been income-related. She signed up with four care providers and agencies during the summer of 2014 and was able to obtain work through at least three of them, but she received jobseeker's allowance from 9 June 2014 to 10 July 2014. This was income-based, apparently on the ground that "your entitlement based on Class 1 national insurance Contributions has run out".

4. The claimant remained on the books of two companies beyond September 2014, but it appears that she had passed her examinations that summer and so was studying again and, because she had not worked for eight weeks, her last contract was terminated in February 2015 when she received some holiday pay. She did not work again until just after she had made her claim for employment and support allowance in June 2015, when she obtained work through an agency for 6-7 hours a week from 20 June 2015, which was accepted as "Permitted Work Higher Limit" for the purposes of her claim for employment and support allowance. On 2 July 2015, the Secretary of State refused the claim. The claimant applied for what the Secretary of State calls reconsideration but which in this case, as in most cases, was technically a decision whether or not to revise his earlier decision under section 9 of the Social Security Act 1998.

5. The Mandatory Reconsideration Notice dated 11 August 2015, in which the Secretary of State set out his reasons for not revising his decision of 2 July 2015, explained that he considered that the claimant had no right of residence in the United Kingdom because she was neither a worker nor a student and had not acquired a right of permanent residence. As to being a worker, he said that she had not provided any evidence that her work had been authorised under the Worker Authorisation Scheme applicable to nationals of Bulgaria and Romania and that she had also failed to provide any verification of employment since the beginning of 2014. He also said that she had provided inconsistent information about her employment with one of the agencies and pointed out that there had been a gap in her employment between February 2015 and her resuming employment on 20 June 2015 and so it appeared that she had not left the job because she was ill or involuntarily unemployed. He did not consider her to have a right of residence as a student because she did not have comprehensive sickness insurance cover. (The writer of the mandatory reconsideration notice does not appear to have appreciated at that time that the claimant was on a three-year degree course and might have been working while on the course, instead apparently believing that she had been a student only for short periods of time.) The Secretary of State did not consider the claimant to have a right of permanent residence because she had not proved that she had had a right of residence as either a worker or a student for, in total, a continuous period of five years.

6. In her grounds of appeal to the First-tier Tribunal, the claimant pointed out that she had produced her blue registration card when she had been interviewed and she included a photocopy for the purpose of proving that her employment had been authorised. She said that she could also provide documents showing that she had five years' employment in the United Kingdom by September 2013. She explained that she had not been studying full-time from September 2013 to September 2014 because she had had to resit examinations and she asserted that, as an EEA migrant worker, she did not need private medical insurance. She also

pointed out that she had been found to have a right of residence in the United Kingdom when she had made her various claims for benefit in 2013 and 2014. She gave addresses and telephone numbers at which former employers could be contacted and she also provided a number of P45s, mostly relating to her benefit claims, and a few payslips, together with documentation relating to awards of jobseeker's allowance and employment and support allowance and to her three-year degree course.

7. In his response to the appeal, the Secretary of State accepted that the blue registration document showed that the claimant was not required to register employment from 29 June 2010 but pointed out that she had not provided worker authorisation certificates for periods before that. He provided print-outs from Departmental records, including the claimant's contribution record but he also pointed out that none of the claimed starting dates and only two of the claimed end dates of the various periods of employment she had identified had been verified and he further submitted –

> "To gain 'worker' status, a person must hold lawful employment that is 'genuine and effective'. Holding a zero hours contract does not equate to 'worker status' – only if the number of hours and length of employment is sufficient to be classed as 'genuine and effective', not 'marginal and ancillary' can 'worker' status be gained."

He therefore argued that the claimant had not provided sufficient evidence that she had gained worker status for any of her alleged employers, except the one for whom she had worked from August 2013 to November 2013 for which she had a P45 showing earnings of £1,878.58, and even then the precise start date had not been proved. He accepted that she had retained worker status until 10 July 2014. He maintained his position that comprehensive sickness insurance cover was required during any period when the claimant sought a right of residence as a student. He therefore submitted that the claimant had not acquired a right of permanent residence by the time of her claim for employment and support allowance on 9 June 2015.

8. The claimant said that she did not wish to attend a hearing of her appeal and so the appeal was considered on the papers. (I am told that she considered her case to be so straightforward that she did not need to attend, given the documentary evidence she had produced as to her possession of the blue registration certificate, of her having been a student and of her having previously been found to have had a right of residence.) Despite the Secretary of State's submission and its finding that, in the light of the blue registration certificate, the claimant "is not required to register employment with the Worker Authorisation scheme from 29.06.10", the First-tier Tribunal decided that the claimant had not shown that any work she had done before 31 December 2013 – *i.e.*, during the "accession period" after Romania joined the European Union – had been authorised. It also decided that the claimant "had left employment to take up a course of study" and it pointed out that her employment from 20 June 2015 was after the date of her claim. It accepted the Secretary of State's argument that the claimant did not have a right of residence as a student because she had not had comprehensive sickness insurance cover. Consequently,

it found that she did not have a right of permanent residence because she had not been resident for five years as a "qualified person".

9. The claimant now appeals with my permission. She is represented on this appeal by Ms Jo Silcox of Harrow Law Centre. The Secretary of State, represented by Mr Michael Page, resists the appeal.

10. It is convenient first to deal briefly with the question whether the claimant had at any time from September 2011 a right of residence by virtue of being a university student, because it is now common ground that she did not. Although regulation 6(1)(e) of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) ("the EEA Regulations"), which were in force at the material time, provided that a "student" was a "qualified person" who, by virtue regulation 14(1) had a right to reside in the United Kingdom, regulation 4(1)(d)(ii) had the effect that a person was a student only if he or she had "comprehensive sickness insurance cover in the United Kingdom". An EHIC card does not generally amount to such cover, although it may in circumstances where a stay in the United Kingdom is temporary and the card is issued by the holder's home country (see *Secretary of State for Work and Pensions v GS (SPC)* [2016] UKUT 394 (AAC)). By 2011, the claimant in this case was not staying temporarily in the United Kingdom and it has not been suggested that she had any other potentially relevant insurance cover. Thus, in this respect, the claimant's case was not as straightforward as she had thought and the First-tier Tribunal was right to reject it.

11. Ms Silcox's primary submission is that, by the time she claimed employment and support allowance on 9 June 2015, the claimant had acquired a right of permanent residence under regulation 15(1)(a) of the EEA Regulations as "an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years". She submits that the claimant had been a "worker" from September 2008 until at least February 2015 and therefore had resided in the United Kingdom "in accordance with these Regulations" for a continuous period of more than five years because a "worker" was a "qualified person" by virtue of regulation 6(1)(b) and so had a right of residence under regulation 14(1). Alternatively, she submits that the claimant was a worker in February 2015 and retained that status because she was ill from then onwards even though she did not claim employment and support allowance until June 2015. In the further alternative, she submits that the claimant retained her status as a worker while she was a student by virtue of European Union law as reflected in regulation 6(2)(d) of the EEA Regulations.

12. Mr Page, on the other hand, submits that, as a Romanian national, the claimant was until 31 December 2013 an "accession State national subject to worker authorisation" under regulation 2 of the Accession (Immigration and Worker Authorisation) Regulations 2006 (SI 2006/3317), as amended, ("the Accession Regulations") and that she had not produced a worker card showing that she had ever been authorised to work. Therefore, he submits, she was not a "worker" prior to 1 January 2014 for the purposes of the EEA Regulations. He accepts that she might have become a worker in the summer of 2014 but submits that, on the available

evidence, she had lost that status by the time she claimed employment and support allowance in June 2015.

13. I do not entirely accept either party's arguments.

14. The First-tier Tribunal made no specific reference to the Accession Regulations, despite the Secretary of State having done so in his response to the claimant's appeal. Regulation 1(2) of the Accession Regulations defined the "2006 Regulations" as the EEA Regulations and applied the definition of "student" in the EEA Regulations to the Accession Regulations. Regulations 2, 5, and 7 of the Accession Regulations provided, as far as is material –

> "**'Accession State national subject to worker authorisation'**
> **2.**—(1) Subject to the following paragraphs of this regulation, in these Regulations 'accession State national subject to worker authorisation' means a national of Bulgaria or Romania.
> …
> (4) A national of Bulgaria or Romania who legally works in the United Kingdom without interruption for a period of 12 months falling partly or wholly after 31st December 2006 shall cease to be an accession State national subject to worker authorisation at the end of that period of 12 months.
> …
> (10) A national of Bulgaria or Romania is not an accession State national subject to worker authorisation during any period in which he is in the United Kingdom as a student and —
> (a) holds a registration certificate that includes a statement that he is a student who may work in the United Kingdom whilst a student in accordance with the condition set out in paragraph (10A); and
> (b) complies with that condition.
> (10A) The condition referred to in paragraph (10) is that the student shall not work for more than 20 hours a week unless —
> (a) he is following a course of vocational training and is working as part of that training; or
> (b) he is working during his vacation.
> (10B) A national of Bulgaria or Romania who ceases to be a student at the end of his course of study is not an accession State national subject to worker authorisation during the period of four months beginning with the date on which his course ends provided he holds a registration certificate that was issued to him before the end of the course that includes a statement that he may work during that period.
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> …
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> **Derogation from provisions of Community law relating to workers**
> **5.** Regulations 6, 7 and 9 derogate during the accession period from Article 45 of the Treaty on the Functioning of the European Union [formerly Article 39 of the Treaty establishing the European Communities], Articles 1 to 6 of Regulation (EEC) No. 1612/68 on freedom of movement for workers within the Community and Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.
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> …

> **Issuing registration certificates and residence cards to nationals of Bulgaria and Romania and their family members during the accession period**
> **7.**—(1) …, an accession State national subject to worker authorisation shall not be treated as a qualified person for the purposes of regulations 16 and 17 of the 2006 Regulations (issue of registration certificates and residence cards) during the accession period unless he falls within sub-paragraphs (c), (d) or (e) of regulation 6(1) of the 2006 Regulations.
> …
> (3) Where the Secretary of State issues a registration certificate during the accession period to a Bulgarian or Romanian national … in any case where he is satisfied that the Bulgarian or Romanian national is not an accession State national subject to worker authorisation (other than solely by virtue of falling within paragraph (10) or (10B) of regulation 2), the registration certificate shall include a statement that the holder of the certificate has unconditional access to the United Kingdom labour market.
> (4) A Bulgarian or Romanian national who holds a registration certificate that does not include a statement that he has unconditional access to the United Kingdom labour market may, during the accession period, submit the certificate to the Secretary of State for the inclusion of such a statement.
> (5) The Secretary of State shall re-issue a certificate submitted to him under paragraph (4) with the inclusion of a statement that the holder has unconditional access to the United Kingdom labour market if he is satisfied that the holder—
> (a) …; or
> (b) has ceased to be an accession State national subject to worker authorisation other than solely by virtue of falling within regulation 2(10).
> (6) A registration certificate issued to a Bulgarian or Romanian student during the accession period shall include a statement that the holder of the certificate is a student who may work in the United Kingdom whilst a student in accordance with the condition set out in regulation 2(10A) and who, on ceasing to be a student, may work during the period referred to in regulation 2(10B), unless it includes a statement under paragraph (3) or (5) that the holder has unconditional access to the United Kingdom labour market.
> (7) But this regulation is subject to regulation 20 of the 2006 Regulations (power to refuse to issue and to revoke registration certificates)."

15. Mr Page's argument is that the claimant had to rely on regulation 2(10) of the Accession Regulations as a ground for exemption from the requirement for authorisation and that she could not do so because she was not a student as she did not have comprehensive sickness insurance cover. Ms Silcox relies on the claimant having had a blue registration certificate since 29 June 2010. She does not fully spell out by reference to the legislation why that is important, but I am satisfied that she is right on this issue.

16. Notwithstanding the use of the word "cease" in regulation 2(4) of the Accession Regulations, which I accept was not entirely apt where a person had previously fallen within the scope of regulation 2(10) or (10B), it appears tolerably clear that a person who had legally worked for 12 months while within the scope of regulation 2(10) or (10B) would also have fallen within the scope of regulation 2(4). Paragraphs (3) and (5) of regulation 7 acknowledged that there might have been an overlap between the various paragraphs of regulation 2. The effect of regulation 7(1) was that the claimant was entitled to a registration certificate. Regulation 7(6) had the effect that, initially, it would include the restrictions on employment imposed

by regulation 2(10A) but, when those ceased to apply after 12 months by virtue of regulation 2(4), the claimant was entitled by virtue of regulation 7(3) to (5) to apply for a certificate stating she had unconditional access to the United Kingdom labour market. In this case, the yellow registration certificate was clearly the one issued under regulation 7(6) and the blue registration certificate was the one issued under regulation 7(3) or re-issued under regulation 7(5). The issue of the blue registration certificate therefore plainly implied that the Home Secretary was satisfied that the claimant had ceased to be an an accession State national subject to worker authorisation, which in turn plainly implied in the circumstances of this case both that she had previously accepted that the claimant was a student and that, at the time of issuing the blue registration certificate, she accepted that the claimant had worked without interruption for a period of 12 months in accordance with the restrictions imposed on her pursuant to regulation 2(10A) of the Accession Regulations or in accordance with regulation 2(10B).

17. Registration certificates are not conclusive evidence of a person's status, but it is to be presumed that they are not issued without the Home Secretary being satisfied by evidence that they ought to be so that, in the absence of any reason to think that they ought not to have been issued, they ought to be accepted at face value and their implications accepted, particularly when a claimant can reasonably have relied on them for some years. In this case, it seems to me that there is nothing inherently surprising in the Home Secretary having accepted that the claimant was a student with comprehensive sickness insurance cover when she first came to the United Kingdom particularly as, as Ms Silcox submits, an EHIC card might well have been regarded as adequate then on the basis that the claimant's initial NVQ course was for a year and so the claimant's stay in the United Kingdom could have been classed as temporary. That being so, there is nothing inherently surprising in the Home Secretary subsequently having been satisfied that the claimant had worked legitimately for a year by June 2010. The issue of a blue registration certificate in June 2010 does not, of course, prove that the claimant was working from September 2008 or was doing so as a student from then but the fact that the claimant had been working from then might be thought to have been supported by her contribution record, which shows that earnings factors derived from paid (as opposed to credited) Class 1 contributions in the years 2008-2009, 2009-2010 and 2010-2011 were, respectively, £6,348, £13,109 and £11,638.

18. The First-tier Tribunal failed to consider the significance of the registration certificate at all, despite it having been at the forefront of the claimant's case. I can understand the implications of the registration certificate not having been quite as clear to the First-tier Tribunal as they were to the claimant, particularly as the Secretary of State had not fully addressed it in his submission to the First-tier Tribunal, but I am nonetheless satisfied that the First-tier Tribunal erred in law in not appreciating that the registration certificate and the contribution record were powerful evidence that the claimant had never been an accession State national subject to worker authorisation and that therefore she was working lawfully and had not been required to obtain an accession worker card and so had had a right of residence during periods when she was working from September 2008 until the worker authorisation scheme came to an end on 31 December 2013. If it was not prepared to accept that evidence, it at least had to give reasons for not doing so.

19. However, accepting that evidence would not get the claimant home and dry on the question whether she had ever acquired a right of permanent residence. The claimant's earnings factors derived from paid Class 1 contributions in the years 2011-2012, 2012-2013, 2013-2014 and 2014-2015 were, respectively, £6,621, £2,545, £1,428 and £2,705.46. I accept that she might have had additional earnings if there were pay periods in which she earned less than the lower earnings limit and so was not required to pay national insurance contributions. Nonetheless, the inescapable, and not very surprising, conclusion to be drawn is that, once she became a full-time university student, the amount of paid employment done by the claimant reduced dramatically. Therefore, even if it is accepted that she was a worker from September 2008 to September 2011, there arises the question whether she continued to be a worker throughout the period thereafter. She may have been on the books of an employer or agency throughout the period from October 2011 until January or February 2015 but, as the Secretary of State submitted to the First-tier Tribunal, a person with a zero hours contract or signed up to an agency is not necessarily a worker at all times and so the claimant was not necessarily a worker throughout that period. On the other hand, a sensible view has to be taken of gaps in employment, whether they are holidays or whether they are simply periods when work is sought but not offered. Some gaps can be regarded as merely incidental to the employment.

20. It is well established that a person is not a worker unless employment is "genuine and effective" and not "marginal and ancillary". However, despite the way that the Secretary of State put his argument before the First-tier Tribunal, it seems to me that in this case. the work for the different care providers and agencies has to be aggregated and it seems obvious that such work as the claimant did both was genuine and was also effective during at least most of the periods when it was actually being done, even if it was not always sufficient fully to support her.

21. In my view, the real question in this case is whether there were periods when either the claimant was not in fact in the labour market because she was neither working nor interested in work so that there were distinct periods of employment and the gaps between them were not normal incidents of employment or the claimant was in the labour market but the work she obtained was so infrequent as to have been marginal or ancillary.

22. The answer to that question requires rather more detailed findings of fact than were made by the First-tier Tribunal and than I am able to make on the somewhat sketchy evidence before me, but she may have a case.

23. It is possible that she worked during term times while she was a university student, although my suspicion is that she did not do so to a great extent and, indeed, that she also did little work during the Christmas and Easter vacations of the years when she was studying. However, she may have done some work for both the hospital and the agency (see doc 41) while in her first year as a student and still living in the same area as before and, in any event, she may well have worked at the hospital in the summer of 2012 before she changed universities. There is also a

suggestion that the she had some earnings from self-employment during the summer vacation of 2012 (doc 127).

24. At one time, the claimant said that she had last worked for the hospital in January 2013 because she then moved to the area where her new university was. However, her course at that university had started in September 2012 and, even if she worked at the hospital during the Christmas vacation, I doubt that she did so during the Autumn term because it was a long way away. There is currently no evidence that the claimant did any work for the hospital after January 2013, even though she remained on their pay roll until 31 August 2014. Nor is there any other evidence of work for any other employers from the end of September 2012 until August 2013.

25. On the other hand, I would be inclined to accept that, from August 2013 until September 2014, the claimant was a worker. She was not studying during that period (except insofar as she presumably did some revision for her resits) and she appears to have been either employed or in receipt of jobseeker's allowance or employment and support allowance on the basis that she retained her status as a worker. However, it is not clear to what extent the claimant worked from September 2014 until December 2014 and she does not appear to have worked from then until she made the relevant claim to employment and support allowance on 9 June 2015.

26. Thus, it seems possible that the claimant was a worker for the three years from September 2008 to September 2011, for three months in the summer vacation in 2012 and for just over a year from August 2013 to September 2014. That is a total of under five years, although spread over a longer period. On the other hand, it is also possible that she was a worker for additional periods.

27. Does it matter that there may well have been gaps between periods in which the claimant was a worker? Regulation 15 of the EEA Regulations required a continuous period, but regulation 3 provided that continuity was not affected by certain periods of absence from the United Kingdom including "any one absence from the United Kingdom not exceeding twelve months for an important reason such as … study …". This reflects the terms of Article 16 of Directive 2004/38/EC, which the EEA Regulations are designed to implement.

28. In CIS/2258/2008, it was held that absences abroad that did not break continuity nonetheless did not count towards the five years because, although in that case they accounted for only five months of the five years, they could in some circumstances be for most of a five year period and so the purpose of the legislation would be defeated. However, in *Idezuna (EEA - permanent residence) Nigeria* [2011] UKUT 474 (IAC), it was implicitly held that short periods of absence from the United Kingdom, during which the applicant plainly remained resident in the United Kingdom, did count towards the five years. In *Babajanov (Continuity of residence - Immigration (EEA) Regulations 2006)* [2013] UKUT 513 (IAC), it was held that a child under the age of 18 had acquired a right of permanent residence while living abroad on the fifth anniversary of his first arrival in the United Kingdom in circumstances where he had lived in the United Kingdom for four years and four months and then accompanied his mother abroad. Those two cases both involved family members

and so it is perhaps not surprising that the focus was on the applicants' connections with the United Kingdom. All three of these cases were concerned with absences abroad.

29. It seems to me that different considerations apply where a claimant needs not only to have been in the United Kingdom but also to have been a qualified person for five years. It is striking that, consistently with the Directive, no provision was made in the EEA Regulations for periods when a person was not a qualified person but was in fact resident in the United Kingdom. Given that Article 16 of the Directive reflects the importance placed on the integration of a Union citizen in a host Member State (see paragraphs (24) and (25) of the preamble to the Directive), it cannot have been intended that periods of study within a host Member State without a right of residence there should affect continuity in the sense of wiping out the credit gained from any previous residence of the claimant as a qualified person. That would be inconsistent with the approach taken to pre-Accession residence in such cases as *Ziolkowski and Szeza* (C-424/10 and C-425/10) and would be liable to be disproportionate. On the other hand, it is plainly the intention that a person should have been present for five years without having been an unreasonable burden on the host Member State before acquiring a right of permanent residence.

30. In these circumstances, I am satisfied that Article 16 and regulation 15 should be interpreted as requiring continuity of residence, but not necessarily continuity of residence in accordance with the Directive or as a qualified person. However, where a person's right of permanent residence under regulation 15 depends on his or her having resided in the United Kingdom as a qualified person, the aggregate of any periods of residence as a qualified person must amount to at least five years. It is therefore possible that the claimant in this case had acquired a right of permanent residence in this case before 9 June 2015, when the relevant claim for employment and support allowance was made. However, the evidence currently before me does not prove that she had acquired such a right by then.

31. As to the claimant's second ground of appeal, that too is not currently supported by the evidence both because the question whether she was still a worker up until December 2014 or February 2015 or any later date would need to be determined first and because the claimant would need to explain why, if she ceased work because she was ill, she did not immediately claim employment and support allowance.

32. As to the claimant's third ground of appeal, she cannot have remained a worker by virtue of regulation 6(2)(d) because, as I explained in *Secretary of State for Work and Pensions v EM* [2009] UKUT 146 (AAC), "vocational training" has a limited meaning and the provision applies only where a person has to retrain in order to find work reasonably equivalent to his or her former employment.

33. In her reply in these proceedings, Ms Silcox informed me that the Secretary of State for the Home Department had accepted on 4 August 2016 that the claimant had a right of permanent residence and had issued a residence certificate to that effect. That is not conclusive but, in any event, since I do not know whether the claimant was a qualified person for any period between 2 July 2015 and 8 August

2016, I do not know whether there would even be any inconsistency between that decision and an adverse decision in the present proceedings. If there were no doubt that the certificate was issued on the basis of evidence available to that Secretary of State to the effect that the claimant had acquired a right of residence by June 2015, it might be appropriate to follow that decision but that is not the position and there is also reason to doubt whether the claimant had acquired a right of permanent residence by 9 June 2015.

34. For all these reasons, I am satisfied that the First-tier Tribunal erred in law in failing to appreciate the significance of the blue registration document, taken with the evidence as to the claimant's contribution record, but I am also not satisfied on the evidence that was before the First-tier Tribunal and is now before me that the claimant did have a right of permanent residence. The claimant having had ample opportunity to provide more evidence to the First-tier Tribunal and having decided not to attend in order to give oral evidence, I have considered whether I should either decline to set aside the First-tier Tribunal's decision or should set it aside and substitute a decision to the same effect. Had the Secretary of State's submission to the First-tier Tribunal recognised the full significance of the blue registration certificate and had it more clearly explained why further details of the actual work done by the claimant from mid-2011 were important, I would probably have taken one of those courses of action. However, it seems to me that, had the First-tier Tribunal correctly appreciated the significance of the blue registration certificate and so not entirely accepted the Secretary of State's case, it might have adjourned in order to give the claimant a further opportunity to give evidence and might have explained why it was so important. I therefore set aside the decision of the First-tier Tribunal and remit the case to a different judge.

35. Finally, I should draw attention to two issues upon which I have received no argument and on which I shall therefore not express a view. The first is whether the "permitted work" that the claimant was doing between the date of her claim and the date of the Secretary of State's decision was sufficient to make her a worker or whether such work is inevitably to be regarded as "ancillary". The second is whether the claimant was still "attending or undertaking a course of study" at the date of the Secretary of State's decision on 2 July 2015, so as to have been a student for the purpose of Chapter 10 to the Employment and Support Allowance Regulations 2008 (SI 2008/794), which might make the question whether she had a right of residence academic.

Mark Rowland
13 June 2017